86 - 1269

No. ___

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HENRY NEAL,
Administer of the Estate of
ROGER F. STROH

Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

28pp

QUESTIONS PRESENTED

(1) Did the Court of Appeals for the Eleventh Circuit err in blindly adopting the reasoning of and following the holding of *White v. Excalibur Ins. Co.*, 599 F.2d 50 (C.A.5, 1979), *cert. denied* 444 U.S. 965 (1979), when the position taken in *White* is the opposite of a position in other Circuits with a contrary position having been taken by the Court of Appeals for the Fourth Circuit, in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974), and a District Court in the Seventh Circuit in *Riddle v. Trans-Cold Exp., Inc.*, 530 F.Supp. 186 (D.C., S.D. I11., 1982)? Further, in the Eleventh Circuit, a Florida appellate court has rejected the reasoning of the *White* decision in *Bryant v. Refrigerated Transport Co., Inc.*, 418 So.2d 281 (Fla.App., 1982). These cases involve the interpretation of that part of the Interstate Common Carrier Act, 49 U.S.C. §§10927(a)(1) and 11107(4) requiring motor carriers to assume full direction and control of leased vehicles, and the implementing regulations of the Interstate Commerce Commission found at 49 C.F.R. §1057.12(d)(1). Under existing case law, the remedy available to one injured by an interstate carrier depends on the *lex loci delicti* of that Federal Judicial Circuit.

(2) Did the Court of Appeals for the Eleventh Circuit err in blindly adopting the position of the Court of Appeals for the Fifth Circuit on an important federal question and thereby creating a lack of uniformity between state appellate courts in the Eleventh Circuit and the Court of Appeals for the Fourth Circuit and a District Court in the Seventh Circuit in the interpretation an application of 49 U.S.C. §§10927(a)(1) and 11107(4) and the implementing reg-

ulations of the Interstate Commerce Commission at 49 C.F.R. §1057.12(d)(1).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. ___

HENRY NEAL,
Administrator of the Estate of
ROGER F. STROH

Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

Henry Neal, Administrator of the Estate of Roger F. Stroh, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled case on August 22, 1986, and Issued as Mandate on November 18, 1986.

OPINIONS BELOW

The unreported Memorandum Opinion and Judgment of the United States District Court for the Mid-

dle District of Alabama are printed in Appendix A hereto, *infra,* page 1a. The unpublished *per curiam* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit are printed in Appendix B hereto, *infra,* page 7a. The unpublished notice of the denial of rehearing *en banc* by the United States Court of Appeals for the Eleventh Circuit is printed herein in Appendix C hereto, *infra,* page 10a.

JURISDICTION

The Judgment of the Court of Appeals (Appendix B, *infra,* page 8a) was entered on August 22, 1986. A timely petition for rehearing *en banc* was denied on November 4, 1986 (Appendix C, *infra,* page 10a) and the Judgment was issued as mandate on November 18, 1986. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 49 U.S.C. § 10927(a)(1) and 49 U.S.C. § 11107(4), and implementing regulations of the Interstate Commerce Commission at 49 C.F.R. § 1057.12(d)(1).

STATEMENT OF THE CASE

This is a wrongful death case arising out of a motor vehicle wreck that occurred on March 20, 1984 on U.S. Highway 82 in Bullock County, Alabama. Petitioner's intestate died as a result of that wreck. The action was filed in the Circuit Court of Jackson County, Indiana, removed to the United States District Court for the Southern District of Indiana by Respondent, and transferred to the United States District Court for the Middle District of Alabama on

motion of the Respondent. Petitioner's theory of liability against Respondent is that Tractor 6540, Inc. operated a tractor-trailer vehicle in interstate commerce pursuant to a contract with Respondent under Interstate Commerce Commission certificates and permits issued to Respondent, and that Petitioner's intestate died as the proximate result of the negligence of Tractor 6540's driver, Richard H. Blackburn, who was operating the vehicle at the time of the fatal wreck. Further, Petitioner contends that Respondent was negligent in assigning the Petitioner's intestate to the driver, Richard H. Blackburn, although Respondent was aware of and possessed information of numerous prior safety and log violations and even one prior chargeable accident, none of which was furnished to Petitioner's decedent. Petitioner's assertion of the liability of Respondent is grounded in the provisions of 49 U.S.C. §§ 10927(a)(1) and 11107(4) and 49 C.F.R. § 1057.12(d)(1) as interpreted by *inter alia*, the United States Court of Appeals for the Fourth Circuit in *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974).

REASONS FOR GRANTING THE WRIT

I. Certiorari Should be Granted Because A Conflict Exists Between The United States Court of Appeals for the Fourth, Fifth And Eleventh Circuits On An Important Question of Federal Law Involving The Application and Interpretation Of 49 U.S.C. §§ 10927(a)(1) and 11107(4)

The United States Courts of Appeals for the Fourth, Fifth and Eleventh Circuits have differing interpretations of 49 U.S.C. §§ 10927(a)(1) and 11107(4) and implementing regulations of the Interstate Commerce Commission at 49 C.F.R. § 1057.12(d)(1), in situations

with facts similar to this case. The Fourth Circuit's well-reasoned opinion is in the case of *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 89 (C.A.4, 1974). In the Seventh Circuit, a United States District Court in Illinois has taken the same position as the Fourth Circuit in the case of *Riddle v. Trans-Cold Exp., Inc.*, 530 F.Supp. 186 (D.C., S.D.Ill., 1982). The United States Court of Appeals for the Fifth Circuit has taken a different position from the Fourth Circuit in the case of *White v. Excalibur Ins. Co.*, 599 F.2d 50 (C.A.5, 1979), *cert. denied* 444 U.S. 965 (1979). The United States Court of Appeals for the Eleventh Circuit in an unpublished opinion in the instant case *sub judice* did not independently consider the question, but blindly followed *White v. Excalibur Ins. Co., supra,* pursuant to its prior decision in *Bonner v. City of Pritchard,* 661 F.2d 1206 (C.A.11, 1981) by which all prior precedent of the "old" Fifth Circuit was adopted *in toto* as controlling precedent of the Eleventh Circuit. A state appellate court within the Eleventh Circuit has rejected the position of the Fifth Circuit (adopted by reference by the Eleventh Circuit) in the case of *Bryant v. Refrigerated Transport Co., Inc.*, 418 So.2d 281 (Fla.App., 1982).

Thus not only is there a conflict between circuits, but one state in the Eleventh Circuit has refused to accept the position adopted by the Eleventh Circuit in the instant case *sub judice.*

II. A Remedy Grounded In Federal Law Should Be Equally Available To All Without Regard To The Federal Judicial Circuit In Which The Remedy Is Sought.

Presently, the remedy that the Petitioner seeks is available in the Fourth and Seventh Circuits, but not

in the Fifth Circuit. See: *Proctor v. Colonial Refrigerated Transportation, Inc., supra,* (C.A.4), and *Riddle v. Trans-Cold Exp., Inc., supra,* and *White v. Excalibur Ins. Co., supra,* (C.A.5). Pursuant to *Bonner v. City of Pritchard, supra,* the Court of Appeals for the Eleventh Circuit blindly adopted the position of the Court of Appeals for the Fifth Circuit.

Within the Eleventh Circuit, the Court of Appeals in the State of Florida in a reasoned opinion has rejected the position blindly adopted by the Court of Appeals for the Eleventh Circuit in the instant case *sub judice.* See: *Bryant v. Refrigerated Transport Co., Inc., Supra.* Thus, within the Eleventh Circuit the availability or non-availability of the remedy sought by Petitioner is not uniform. In the State of Florida, a case which cannot be removed to a United States District Court (because of lack of total diversity or because of the amount in controversy) will be governed by a rule of decision allowing the remedy which Petitioner seeks, while a case that is removable will be governed by a rule of decision denying the remedy which Petitioner seeks.

Further, in the United States District Court in the State of Illinois, which is in the Seventh Circuit, the remedy sought by Petitioner is available (although the Seventh Circuit Court of Appeals has yet to speak to the issue). See: *Riddle v. Trans-Cold Exp., Inc., supra. The Petitioner had the remedy available to him in the Seventh Circuit where the case was originally filed. However, by forum shopping and having the case transferred the Respondent has denied the Petitioner his remedy.*

In sum, if the I.C.C. certificate and permit holder can, as in this case, maneuver the case from one

Judicial Circuit into another Judicial Circuit, the certificate and permit holder can deny a victim a remedy for the gravamen because the Federal law is not uniformly applied and the remedies it ostensibly provides are not equally available.

CONCLUSION

WHEREFORE, Your Humble Petitioner prays that this Honorable Court will, for the foregoing reasons, grant a Writ of Certiorari directed to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

APR 1 1986

MEMORANDUM OPINION

This wrongful death action is now before the court on the defendant Midwestern Distribution, Inc.'s February 28, 1986, motion for summary judgment. For reasons that follow, the motion is due to be granted and the case dismissed, albeit without prejudice.

I.

The undisputed facts of this case are as follows. The defendant Midwestern Distribution, Inc., a licensed interstate motor carrier, entered into a lease agreement with Tractor 6540, Inc. in November of 1983. Each company is incorporated in the State of Kansas. Under the terms of the lease, Tractor 6540 agreed to provide Midwestern

with trucks and drivers to be used in Midwestern's business.

Roger F. Stroh and Richard H. Blackburn were working for Tractor 6540 as drivers, hauling merchandise for Midwestern according to the terms of the lease. On March 20, 1984, while Blackburn was driving and Stroh was asleep in the truck's cab, their vehicle was involved in an accident on U. S. Highway 82 in Bullock County, Alabama. Stroh was killed in the collision.

Stroh was a resident of the State of Indiana. The administrator of Stroh's estate, Henry Neal, brought this tort action in the Jackson Circuit Court of Indiana on January 28, 1985. After being removed to the United States District Court for the Southern District of Indiana pursuant to 28 U.S.C.A. §§ 1332 and 1441, the cause was transferred to this court pursuant to 28 U.S.C.A. § 1404(a). The amended complaint alleges two theories of recovery: First, that Midwestern is indirectly liable for Blackburn's negligence under the doctrine of respondeat superior; and second, that Midwestern is directly liable because it negligently selected Blackburn to be Stroh's co-driver. A jury trial is requested.

II.

The question presented by Midwestern's motion for summary judgment is whether Neal can maintain a common law action based on negligence. For reasons that follow, the court concludes that no such action can be maintained.

The basis for this conclusion begins with the surrounding regulatory framework. In 1956, Congress amended the interstate Common Carrier Act "to protect the public from the tortious conduct of judgment-proof operators of interstate motor carrier vehicles." *Price v. Westmoreland,* 727 F.2d 494, 496 (11th Cir. 1984). Motor carriers had previously immunized themselves from the negligence of drivers by designating them as independent contractors. *See*

generally Transamerica Freight Lines v. Brada Miller Freight Systems, Inc., 423 U.S. 28, 36-38, 96 S.Ct. 229, 233-234 (1975). Under the amended statute, motor carriers must now "assume complete responsibility for the operation of [leased] equipment for the duration of the lease." 49 C.F.R. § 1057.12(c)(1); *see also* 49 U.S.C.A. § 11107. They are treated as if they were the actual owners of the leased vehicles and must "assume the burden of liability for the harm caused by their leased vehicles . . . ." *White v. Excalibur Insurance Co.*, 599 F.2d 50, 53 (5th Cir.), *cert. denied*, 444 U.S. 965, 100 S.Ct. 452 (1979).

Because each carrier "now has both a legal right and duty to control vehicles operated for its benefit," drivers are considered each carrier's "statutory employees." *Id.* When members of the public are injured by such drivers, federal law creates a tort remedy against the carrier for negligence. *See, e.g., Price v. Westmoreland*, 727 F.2d at 496; *Simmons v. King*, 478 F.2d 857, 867 (5th Cir. 1973).

However, unlike members of the public, drivers may not recover for on the job injuries by bringing a common law suit for negligence against carriers. Their only remedy against carriers, who are, in effect, their "statutory employers," lies in state worker compensation laws. *White v. Excalibur Insurance*, 599 F.2d at 53-54. This approach is based on considerations of fairness. Motor carriers are subjected to liability under federal tort law because harm to the public is deemed to have been caused by their "statutory employees." It would be unfair to allow those same "employees" to sue the carriers in tort when other employees are barred from bringing such lawsuits under state worker compensation laws. To do so "would broaden [the] exposure [of statutory employers] to suit beyond that to which employers in fact are subject." *Id.* at 53. Thus, when the driver of a leased vehicle causes injury or death to a fellow driver while hauling goods for a carrier, the carrier's total liability is determined not by reference to com-

mon law principles of negligence, but by state worker compensation.[1]

Here, Midwestern leased trucks and drivers from Tractor 6540 and agreed to assume full responsibility for and control over the trucks and drivers for the duration of the lease. Midwestern, as a carrier, must therefore be treated as if it actually owned the trucks. Moreover, Stroh and Blackburn, as drivers of those trucks, must be deemed statutory employees of Midwestern. Where, as here, Stroh was killed during the course of his duties on behalf of Midwestern, his exclusive remedy against Midwestern is confined to whatever relief is provided by applicable state worker compensation law. *White v. Excalibur Insurance, supra.* Midwestern's motion for summary judgment is therefore due to be granted. *Id.*

III.

The court is of the opinion, however, that the dismissal should be without prejudice. It may be that Stroh has an action against Midwestern under Alabama or Kansas worker compensation law, although the court need not decide that question.

An appropriate judgment will be entered.

DONE, this the 1st day of April, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

---

[1] The plaintiff suggests that this court should not follow *White.* He contends that *White* represents a minority view on the issues presented. Even if this assertion were true, however, *White*, is a decision of the former Fifth Circuit Court of Appeals, and as such, is binding on this court. *See Bonner v. City of Prichard, Alabama,* 661 F.2d 1206 (11th Cir. 1981) (en banc). Moreover, *White* was cited with approval in *Price v. Westmoreland,* 727 F.2d at 496, a recent Eleventh Circuit decision.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-5-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

APR 1 1986

JUDGMENT

In accordance with the memorandum opinion entered this date, it is the ORDER, JUDGMENT, and DECREE of this court:

(1) That defendant Midwestern Distribution, Inc.'s February 28, 1986, motion for summary judgment be and it is hereby granted;

(2) That this cause be and it is hereby dismissed without prejudice; and

(3) That costs be and they are hereby taxed against plaintiff Henry Neal, administrator of the estate of Roger F. Stroh, for which execution may issue.

DONE, this the 1st day of April, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 86-7283
Non-Argument Calendar

HENRY NEAL, Administrator of
the Estate of Roger F. Stroh,
Plaintiff-Appellant,

versus

MIDWESTERN DISTRIBUTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

(August 22, 1986)

Before RONEY, HILL and KRAVITCH, Circuit Judges.

PER CURIAM:

The district court properly applied the precedent established by *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir.), *cert. denied*, 444 U.S. 965 (1979). That case is binding on panels of the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981) (en banc). Although appellant urges this Court to reconsider its holding in *White*, only the en banc court can overrule a panel decision binding on this Court. *Id.* at 1209.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 86-7283
Non-Argument Calendar

D.C. Docket No. 86-0015

HENRY NEAL, Administrator of
the Estate of ROGER F. STROH,
Plaintiff-Appellant,

versus

MIDWESTERN DISTRIBUTION, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Alabama

---

Before RONEY, HILL and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Circuit Rule 23.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that plaintiff-appellant pay to defendant-appellee, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 22, 1986
For the Court: Miguel J. Cortez, Clerk

By: /s/ WARREN A. GODFREY
Deputy Clerk

ISSUED AS MANDATE: NOV 18, 1986

APPENDIX C

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
50 Spring Street, S.W.
Atlanta, Georgia 30303-3147

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

November 4, 1986

(Rev. 10/84)

TO ALL PARTIES LISTED BELOW:
NO. 86-7283 NEAL v. MIDWESTERN DISTRIBUTION, INC.

This is to advise that an order has this day been entered denying the petition( ) for rehearing.

___ The Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

XX No member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure, Eleventh Circuit Rule 26), the petition( ) for rehearing en banc has also been denied.

See Rule 41, F.R.A.P., and Eleventh Circuit Rule 27 for issuance and stay of the mandate.

Sincerely,

MIGUEL J. CORTEZ, CLERK

By:/s/ SANDIA L. SEABURY
Deputy Clerk

cc: Allen W. Howell, Esquire
Thomas L. Davis, Esquire
James H. Anderson, Esquire

APPENDIX D

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of
The Estate of ROGER F. STROH,

Plaintiff,

v.

MIDWESTERN DISTRIBUTION, INC.

Defendant.

FILED

MAR 11 1986

ORDER

Based upon the representations made at the pretrial conference on March 10, 1986, it is ORDERED that the plaintiff's March 7, 1986, motion for leave to amend complaint is granted.

DONE, this the 11th day of March, 1986.

/s/ UNREADABLE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

CIVIL ACTION NO. 86-T-015-N

HENRY NEAL, Administrator of the Estate of ROGER F. STROH,

Plaintiff,

-v-

MIDWESTERN DISTRIBUTION, INC.,

Defendant.

AMENDED COMPLAINT FOR DAMAGES FOR WRONGFUL DEATH

Count I.

1. On or about October 11, 1984, Carol Speckner, Clerk of the Circuit Court of Jackson County, issued Letters of Administration to plaintiff as administrator of the Estate of Roger F. Stroh for the purposes of pursuing a wrongful death action. A copy of said Letters of Administration is attached hereto as Exhibit "A".

2. At all times relevant herein, Roger F. Stroh was a resident of Jackson County, Indiana.

3. At all times relevant herein, defendant Midwestern Distribution, Inc. did business in the State of Indiana.

4. Roger F. Stroh died as a result of a motor vehicle accident in the State of Alabama on March 20, 1984.

5. Roger F. Stroh was survived by his dependents, Jean Stroh, wife, and Anthony D. and Lori L., children.

6. At the time of his death, Roger F. Stroh was employed by Tractor 6540, Inc.

7. At all times relevant herein, Tractor 6540, Inc. operated a tractor pursuant to a contract with Midwestern Distribution, Inc. and under Interstate Commerce Commission certificates and permits issued to Midwestern Distribution, Inc. A copy of the aforesaid contract is attached hereto as Exhibit "B".

8. The death of Roger F. Stroh was proximately caused by the negligence of Richard H. Blackburn who was operating a tractor-trailer pursuant to Interstate Commerce Commission certificates and permits issued to Midwestern Distribution, Inc.

9. As a result of the aforesaid vehicle operated by Richard H. Blackburn imposed upon Midwestern Distribution, Inc., by law, it is liable for the death of Roger F. Stroh.

WHEREFORE, plaintiff Henry Neal, Administrator of the Estate of Roger F. Stroh prays for a judgment against defendant Midwestern Distribution, Inc. for all damages recoverable under law proximately caused by the wrongful death of Roger F. Stroh.

Count II.

1. Plaintiff incorporates by reference rhetorical paragraphs 1, 2, 3, 4, 5 and 8 of Count I.

2. On or about February 24, 1984, Roger F. Stroh, having completed a driver instruction course offered by defendant Midwestern Distribution, Inc., was assigned by defendant to Tractor 6540, Inc. as a co-driver to Richard Blackburn, president of Tractor 6540, Inc., an independent contractor of Midwestern Distribution, Inc.

3. Prior to said assignment, Midwestern Distribution, Inc. was aware and had considerable information that Richard Blackburn had committed numerous log violations

in violation of the safety policy of defendant and had been involved in at least one chargeable accident.

4. Midwestern Distribution, Inc. breached its duty and did not communicate any of the aforesaid information to Roger F. Stroh prior to assigning him to Tractor 6540, Inc. as a co-driver.

5. The death of Roger F. Stroh was proximately caused by the negligence of Midwestern Distribution, Inc.

WHEREFORE, plaintiff Henry Neal, Administrator of the Estate of Roger F. Stroh prays for judgment against defendant Midwestern Distribution, Inc. for all damages recoverable under law proximately caused by the wrongful death of Roger F. Stroh.

LOCKE REYNOLDS BOYD & WEISELL

By:/s/ THOMAS L. DAVIS
THOMAS L. DAVIS
Attorneys for Plaintiff
Henry Neal, Administrator of the
Estate of Roger F. Stroh

Supreme Court, U.S.
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No. 86-1269

IN THE

Supreme Court Of The United States

October Term, 1986

HENRY NEAL,
Administrator of the Estate of
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Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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13pp

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Does a conflict exist between the United States Circuit Courts of Appeal involving interpretation of 49 U.S.C. §§ 10927 (a) (1) and 11107 (a)?

(2) Should this Honorable Court review a conflict among United States Circuit Courts of Appeals involving state substantive law questions?

LIST OF CORPORATE AFFILIATIONS

In accordance with Rule 28.1 of the Rules of the Supreme Court of the United States, the following is a list of corporate affiliates of Midwestern Distribution, Inc.:

Midwestern Distribution, Inc.
Leaseway Transportation, Inc.
Allstate Insurance Company
Northbrook Insurance Company
Sears, Roebuck & Company
Mission Insurance Company
National Union Insurance Company
Fireman's Fund Insurance Company

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No. 86-1269

IN THE

Supreme Court Of The United States

October Term, 1986

HENRY NEAL,
Administrator of the Estate of
ROGER F. STROH
Petitioner,

v.

MIDWESTERN DISTRIBUTION, INC.
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a wrongful death case brought by the administrator of a deceased truck driver's estate against Midwestern Distribution, Inc. ("Midwestern"), the company which was the lessee of the truck in which the deceased ("Stroh") was killed. Midwestern leased the truck from a corporation, Tractor 6540, Inc., and Stroh was one of two truck drivers who were alternating the driving duties for Tractor 6540. Petitioner's theory of lia-

bility against Midwestern is that 49 U.S.C. §§ 10927 (a) (1) and 11107 (4) and the implementing regulation of the Interstate Commerce Commission place the responsibility for Stroh's death on the lessee carrier, Midwestern.

The district court held, and the Eleventh Circuit affirmed, that the statutory scheme in question is intended to protect only "members of the public," and Stroh, as an employee of the lessor and a "statutory employee" of Midwestern, does not fall within the protected class of "members of the public." Consequently, summary judgment was entered and later affirmed in favor of Midwestern because the aforesaid federal statutes did not create a cause of action for Stroh and state worker's compensation law barred any other possible cause of action in tort.

SUMMARY OF THE ARGUMENT

Petitioner brought this tort action based on a theory of liability grounded in Interstate Commerce Commission regulations. Undoubtedly, those federal statutes and regulations create a cause of action only for "members of the public." These statutory laws were intended to destroy independent contractor status for lessors of trucks engaged in interstate commerce so that an injured *member of the public* could recover for his injuries from the more financially stable lessee carriers. Petitioner argues that these regulations also apply to *drivers* employed by the lessor so as to allow those drivers to recover for their injuries against the lessee carriers. This argument is made even though there is no dispute that the driver is also a "statutory employee" of the lessee carrier.

It is the respondent's position that such broadening of the statutory regulations was not intended by the Interstate Commerce Commission or by Congress. As federal law does not create a cause of action for Petitioner, any available cause of action is controlled by state law and does not justify review by this Honorable Court.

REASONS FOR DENYING THE WRIT

I. No Conflict Exists Between The United States Courts of Appeal Involving Interpretation of 49 U.S.C. §§ 10927(a)(1) and 11107(4).

Petitioner asserts that a "conflict" exists between the United States Courts of Appeal for the Fourth, Fifth, and Eleventh Circuits involving the interpretation of 49 U.S.C. §§ 10927 (a) (1) and 11107 (4) and the statutes' implementing regulation. The asserted "conflict" is artificially created by Petitioner's misinterpretation of the cases and misguided reliance on dictum within those cases. The alleged "conflict" does not constitute a genuine conflict among circuits so as to justify this Court's granting of certiorari.

The Eleventh Circuit's underlying holding in this case is that the aforecited federal statutes do not create a cause of action for Stroh because he was a statutory employee of Midwestern, and therefore was not within the protected "member of the public" class. This is the key issue for the resolution of the merits of this case; i.e., whether a "statutory employee" of a lessee carrier is a "member of the public" entitled to protection under the federal statutes.

The Eleventh Circuit's holding that the federal statutes in question do not supply Stroh with a cause of action echoes the precise holding of *White v. Excalibur Insurance Co.*, 599 F.2d 50 (5th Cir.), cert. denied 444 U.S. 965, 100 S.Ct. 452, 62 L.Ed.2d 377 (1979). Pursuant to the case of *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981), *White* is binding precedent in the Eleventh Circuit for the case at hand. The Eleventh Circuit correctly analyzed, followed, and applied *White* to the present case.

Petitioner argues that three cases conflict with *White* and with the Eleventh Circuit's holding in the present case. As the following discussion shows, none of these cases create a genuine conflict worthy of this Court's review.

First, Petitioner argues that *Riddle v. Trans-Cold Export, Inc.*, 530 F.Supp. 186 (S.D. Ill. 1982), conflicts with the pres-

ent holding and therefore, that conflict exists between the Eleventh and Seventh Circuits (although this issue has never been heard by the Seventh Circuit Court of Appeals). The Illinois district court in *Riddle* noted that the I.C.C. statutes in question require a plaintiff to be a "member of the general public" before such an action can be brought against the lessee for the lessor's negligence. 530 F.Supp. at 189. The court, citing and following the Fifth Circuit in *White v. Excalibur Ins. Co.*, supra, found that the plaintiff, a co-driver of a truck, was not a member of the general public and granted the lessee carrier's Motion for Summary Judgment.

Plainly, the Illinois district court — which Petitioner contends represents the whole Seventh Circuit — followed *White* and is in complete accord with the precise holding below. A single footnote in *Riddle* shows a disagreement with *White* concerning available state law remedies, but that point of disagreement is not on the merits of the federal issue involved herein. The true holding of *Riddle* completely supports the present holding of the Eleventh Circuit and presents no conflict among the circuits.

Second, Petitioner argues that *Bryant v. Refrigerated Transport Co.*, 418 So.2d 281 (Fla. Dist. Ct. App. 1982) conflicts with the present holding. Therefore, the Petitioner argues there is a conflict among the courts within the Eleventh Circuit. This argument is completely meritless. In *Bryant*, a Florida state intermediate appellate court allowed an action by the estate of a deceased truck driver to proceed against the lessee carrier based on several unique factors. There was no employment contract, express or implied, between Bryant and the lessee, and, most importantly, there existed an express contractual agreement between the lessor and the lessee that Bryant was not an employee of the lessee. Based on these facts, the Florida court found that Bryant was not an employee — statutory or otherwise — of the lessee and was in effect a complete stranger to the lessee. The fact situation in *Bryant* is clearly distinguishable from the present case in which Midwestern had exclusive control over the actions of Stroh and his co-driver.

Therefore, there is no merit to Petitioner's argument that there is a conflict among the courts in the Eleventh Circuit concerning this issue. See, e.g., *Garrett v. Superior Trucking Co.*, 162 Ga. App. 558, 290 S.E.2d 528 (1982).

Petitioner next argues that *Proctor v. Colonial Refrigerated Transportation, Inc.*, 494 F.2d 80 (4th Cir. 1974), conflicts with the present holding by the Eleventh Circuit. At first glance, it appears that a conflict does exist. However, a closer study of *Proctor* and more recent cases reveals that there is no conflict worthy of this Court's review.

Proctor was decided in 1974, several years before the other cases discussed herein which support the present holding. *Proctor* held that a co-driver of a leased truck was a stranger to the lessee carrier just as a member of the public and, consequently, the lessee was responsible for the co-driver's injuries.

However, in November of 1975, this Honorable Court in effect altered that part of the *Proctor* decision by holding that a driver for the lessor was not a member of the public within the protection of the Interstate Commerce Commission regulatory statutes. *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 39, 96 S.Ct. 229, 46 L.Ed.2d 169, 178 (1974) ("[T]he lease did not affect this basic responsibility of the lessee to the public; it affected only the relationship between the lessee and the lessor."). While not expressly overruling *Proctor*, it certainly altered the holding so as to change its effect on the present case. Furthermore, *Transamerican* did overrule *Alford v. Major*, 470 F.2d 132 (7th Cir. 1972), which was a primary case relied on in the *Proctor* decision. See, *Proctor*, 494 F.2d at 92.

The effect of the *Proctor* decision was so altered by *Transamerican* as to dissipate any conflict which may have existed. The Fifth Circuit specifically rejected *Proctor* after *Transamerican* and no Circuit Court of Appeals has ever followed the *Proctor* rationale (See *White*, 599 F.2d at 55-56). On the other hand, the *White* decision was completely followed by the Fifth Circuit's recent decision in *Price v. Westmoreland*, 727 F.2d 494 (5th Cir. 1984). This Honorable Court has denied

certiorari once on this issue, *White,* supra, and should do so again in the present case.

II. Any Conflict Among the Circuits Concerns State Substantive Law Questions and Does Not Justify This Court's Review.

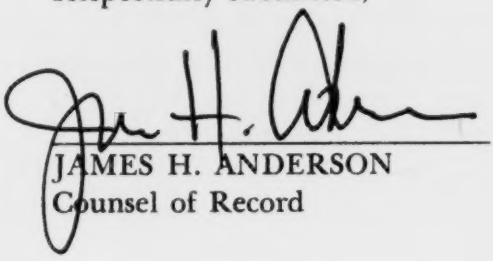
Pursuant to the above argument, no right of action was created for Stroh by the Interstate Commerce Commission regulatory statutes. Consequently, any remedy available to Stroh is governed by state law schemes governing employees and their right to worker's compensation benefits. Each state may have its own rule relating to whether a person classified as a "statutory employee" is covered by that state's worker's compensation laws without invoking this Court's review. Most states have an "exclusivity" provision in their worker's compensation statutes barring other tort actions and it is up to each of those states to interpret their state statutes. The *Proctor* court interpreted South Carolina's worker's compensation scheme to not bar a common law negligence action by a statutory employee, while the *White* court and the Eleventh Circuit court in the present case interpreted different state statutes to bar a common law negligence action for a statutory employee.

If a "conflict" indeed exists between the cases asserted by Petitioner, it is a conflict among the applications of state substantive law worker's compensation remedies. Such a conflict does not justify this Court's granting of certiorari. *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, 206, 58 S.Ct. 860, 862, 82 L.Ed. 1290, 1292 (1983) (A difference in opinion as to state law questions is not a reason for granting certiorari.).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



JAMES H. ANDERSON
Counsel of Record

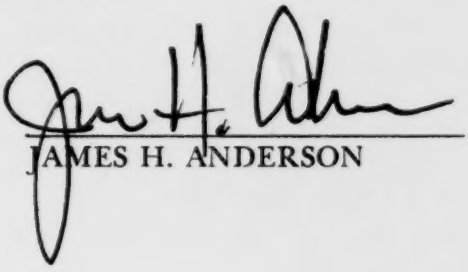
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CERTIFICATE OF SERVICE

I, James H. Anderson, a member of the Bar of the Supreme Court of the United States and the Attorney for Midwestern Distribution, Inc., do hereby certify that I have served a copy of the foregoing upon all counsel of record in this cause by placing same in the United States Mail, postage prepaid, this the 2nd day of March, 1987, addressed as follows:

Allen W. Howell
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JAMES H. ANDERSON

